Supreme Court, U.S.
FILED
JUL 1 1996
OFFICE OF THE CLERK

No. 96 392

In The
Supreme Court of the United States
October Term, 1996

MARK G. SERTICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED FOR REVIEW[1]

I.

WAS A MATERIAL POINT OF FACT OVERLOOKED IN THE NINTH CIRCUIT COURT OF APPEAL OPINION IN THAT THE UNDERLYING DISTRICT COURT FOUND THE APPELLANT MARK SERTICH'S ("PETITIONER") PLEA AGREEMENT TO BE AMBIGUOUS ON TWELVE SEPARATE OCCASIONS AT THE HEARING FOR ENFORCEMENT OF THE PLEA AGREEMENT HEARING, IN CONTRADICTION OF *UNITED STATES V. HARVEY*, 791 F.2D 294 (4TH CIR. 1986)?

II.

WAS A MATERIAL POINT OF LAW OVERLOOKED BY THE NINTH CIRCUIT IN THAT NO ANALYSIS OR REFERENCE WAS MADE TO *UNITED STATES V. YAHNE*, 1994 WL 110138, 4 (N.D. ILL. 1994), CONCERNING LANGUAGE CONTENT OF NON-PROSECUTION CLAUSES?

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[1]Sertich is the only Defendant/Appellant who has sought relief through the Ninth Circuit and this forum.

QUESTIONS PRESENTED FOR REVIEW -
Continued

III.

WAS A MATERIAL POINT OF LAW OVERLOOKED IN PETITIONER'S PLEA AGREEMENT SINCE, AS A RESULT OF THE AMBIGUITY FOUND BY THE UNDERLYING DISTRICT COURT, THE NINTH CIRCUIT DID NOT ASSESS THE GOVERNMENT'S BURDEN TO "BEAR RESPONSIBILITY FOR ANY LACK OF CLARITY" UNDER *UNITED STATES V. ANDERSON*, 970 F.2D 602 (9TH CIR. 1992)?

IV.

WAS A MATERIAL POINT OF FACT OVERLOOKED BY THE NINTH CIRCUIT IN THAT IT DID NOT CONTEMPLATE THE "SAME COURSE OF CONDUCT" ISSUE UNDER THE SENTENCING GUIDELINES, NAMELY, THAT NO REQUIREMENT EXISTS THAT PETITIONER BE "CONNECTED TOGETHER" BY COMMON PARTICIPANTS OR BY AN OVERALL SCHEME, BUT RATHER, WHETHER DEFENDANT HAS ENGAGED IN AN IDENTIFIABLE BEHAVIOR PATTERN, UNDER *UNITED STATES V. PERDOMO*, 927 F.2D 111 (2D CIR. 1991)?

QUESTIONS PRESENTED FOR REVIEW - Continued

V.

WAS A MATERIAL POINT OF LAW OVERLOOKED BY THE NINTH CIRCUIT IN THAT IT FAILED TO ADDRESS THE WIDE DISPARITY IN SENTENCING IMPOSED FOR PETITIONER VERSUS CO-DEFENDANTS, CONTRARY TO THE "REASONABLE UNIFORMITY" REQUIREMENT UNDER *UNITED STATES V. HAHN*, 968 F.2D 933 (9TH CIR. 1992)?

VI.

WAS A MATERIAL POINT OF LAW OVERLOOKED BY THE NINTH CIRCUIT IN THAT THE OPINION FAILS TO ADDRESS THE ISSUE OF PETITIONER'S "REASONABLE UNDERSTANDING" OF THE PLEA AGREEMENT UNDER *UNITED STATES V. DE LA FUENTE*, 8 F.3D 1333 (9TH CIR. 1993)?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

United States of America
Mark G. Sertich
Abram Egyazarov (District Court only)
Eugene Slusker (District Court only)
Samuel Lehtzer (District Court only)

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties to Proceedings Below iv

Table of Contents v

Table of Authorities vi

Reports of the Opinions of the Ninth Circuit 1

Statement of Supreme Court Jurisdiction 1

Constitutional Provisions Involved in the Case 2

Statement of Proceedings and Disposition 2

Statement of Facts 4

Reasons Relied Upon for Allowance of the Writ of Certiorari 5

I. Certiorari is warranted because the Ninth Circuit incorrectly failed to follow other circuit court opinions concerning ambiguity, clarity of nonprosecution language, same course of conduct issues, double jeopardy, prosecutory misconduct and what Petitioner's reasonable understanding was in connection with his plea agreement. Additionally, the Ninth Circuit failed to recognize the trial court's continuous reference to the ambiguities present in the plea agreement which, by law, is burdened upon the government, not the defendant 5

Conclusion 9

TABLE OF AUTHORITIES

Page

FEDERAL APPEALS COURT CASES

United States v. Anderson, 970 F.2d 602 (9th Cir. 1992) 7, 9

United States v. De La Fuente, 8 F.3d 1333 (9th Cir. 1993) 9

United States v. Hahn, 968 F.2d 933 (9th Cir. 1992) 8

United States v. Harvey, 791 F.2d 294 (4th Cir. 1986) 6

United States v. Massey, 997 F.2d 823, 824 (10th Cir. 1993) 7

United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991) 8

United States v. Yahne, 1994 WL 110138, 4 (N.D. Ill. 1994) 6

FEDERAL STATUTES

18 U.S.C. §371 . . . . . 3, 4, 8

28 U.S.C. §1291 4

78 U.S.C. §1254(1) 2

Supreme Court Rule 10(.1.)(a) 1

REPORT OF THE OPINIONS OF THE NINTH CIRCUIT

The opinion of the Ninth Circuit Court of Appeals dated October 24, 1995, is unreported. (App. 1) The Ninth Circuit order affirming the judgment against Appellant entered on December 6, 1995. (App. 8) The order of the Court of Appeals denying Appellant's petition to recall the mandate filed March 29, 1996, is unreported. (App. 10)

STATEMENT OF SUPREME COURT JURISDICTION

Petitioner submits his Petition for Writ of Certiorari pursuant to Rule 10(.1.)(a) of the Supreme Court Rules:

> .1. A review of Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of

last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such as departure by a lower court, as to call for an exercise of this Court's power of supervision.

This Court's jurisdiction to review the Court of Appeals decision is conferred by 78 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment V. Grand jury indictment for double jeopardy

In all criminal prosecutions, the accused shall not be subject for the same offense to be twice put in jeopardy of life or limb.

STATEMENT OF PROCEEDINGS AND DISPOSITION

In October, 1991, the Grand Jury for the Central District of California returned a one count indictment against Petitioner Mark G. Sertich (hereinafter "Petitioner"), and co-conspirators Abram Egyazarov ("Egyazarov"), Eugene Slusker ("Slusker") and Samuel

Lehtzer ("Lehtzer") for violation of Section 371 of Title 18, United States Code, conspiracy to commit fuel excise tax evasion (the "California Indictment").

Although Petitioner initially plead not guilty to the charge alleged, in December 1991, Petitioner and the United States Government entered into plea agreement negotiations. On January 3, 1992, a change of plea hearing was held, and on February 24, 1992, Petitioner's sentencing hearing took place.

In April 1992, Petitioner surrendered to Federal authorities at the Eglin Prison Camp, located at Eglin Air Force Base in Florida and remained incarcerated until January 28, 1993. On approximately November 19, 1993, the Grand Jury for the Northern District of Indiana returned a one count indictment charging Petitioner and "other co-conspirators, known and unknown" with violation of §371, Title 18, United States Code, conspiracy to obstruct the Internal Revenue Service in collection of fuel excise taxes (the "Indiana Indictment").

On July 21, 1994, Petitioner filed a Motion for Enforcement of Plea Agreement Which Bars Further Prosecution of the Indiana Indictment. An abbreviated hearing took place on August 29, 1994, and on September 22, 1994, the District Court heard extensive argument on Petitioner's motion. On September 30, 1994, after taking the matter under submission and without an evidentiary hearing, the District Court entered an order denying Petitioner's motion.

Pursuant to Title 28, U.S.C. §1291, Petitioner appealed from the District Court's order denying his Motion for Enforcement of the Plea Agreement and seeks a remand to the District Court for an appropriate ruling barring his further prosecution by the U.S. Government, including the Northern District of Indiana for the identical conspiracy charges.[2]

STATEMENT OF FACTS

Petitioner seeks this Petition for Writ of Certiorari as detailed above as he is facing incarceration for the second time, for the same offense, in violation of his Constitutional rights, which constitutes special and important reasons for consideration.

The original Complaint brought against Petitioner and his co-defendants Abram Egyazarov, Eugene Slusker and Samuel Lehtzer was brought pursuant to 18 U.S.C. §371. The Ninth Circuit maintained jurisdiction pursuant to 28 U.S.C. §1291.

The Ninth Circuit Order Denying Petitioner's Petition For Rehearing contradicts other Circuit opinions concerning ambiguity, clarity of non-prosecution language,

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[2]Petitioner's Motion to Dismiss for Double Jeopardy before the United States District Court for the Northern District of Indiana is currently under submission.

same course of conduct issues, double jeopardy, prosecutorial misconduct, and what Petitioner's reasonable understanding was in connection with his plea agreement. The varying decisions concerning the enforcement of plea agreements with defendants, on a national basis, has triggered an overriding need for direction and national uniformity on this issue, especially in light of the compelling Constitutional violations which Petitioner may suffer.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. Certiorari is warranted because the Ninth Circuit incorrectly failed to follow other circuit court opinions concerning ambiguity, clarity of nonprosecution language, same course of conduct issues, double jeopardy, prosecutory misconduct and what Petitioner's reasonable understanding was in connection with his plea agreement. Additionally, the Ninth Circuit failed to recognize the trial court's continuous reference to the ambiguities present in the plea agreement which, by law, is burdened upon the government, not the defendant.

This case presents a multitude of issues surrounding Appellant's constitutional rights involving double jeopardy under the Sixth Amendment to the Constitution. The area

of plea agreement negotiations and drafting has continued to generate significant review in the various district courts of appeal requiring heightened scrutiny due to the far-reaching impact on individuals' constitutional rights.

A. The Underlying District Court's Finding Of Ambiguity In Petitioner's Plea Agreement At The September 22, 1994 Hearing On Twelve Separate Occasions Was Overlooked In The Ninth Circuit Court Of Appeal Opinion.

Petitioner submits that this oversight was extremely significant since the District Court's finding necessarily, by operation of fact and law, requires the ambiguity to be read *against* the U.S. Government, thereby barring further prosecution under *Harvey*. As the *Harvey* court stated at 300, "Both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly then would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements."

B. No Analysis Or Reference To The *United States v. Yahne* Case, The Seminal Case Governing Acceptable Plea Agreement Language.

The Ninth Circuit failed to acknowledge that no "explicit limitation language," as found in *Yahne*, appeared in Petitioner's plea agreement. In sum, had the U.S. Attorney's office for the Central District of California

been genuinely concerned and intent upon explicitly limiting the scope of United States' non-prosecution to *only* the Central District of California, more precise, or at the least, more definitive language was required for non-prosecution purposes.

C. Since The Underlying District Court Found Ambiguity In The Plea Agreement, The Ninth Circuit Overlooked The Material Point Of Law In Not Addressing The Government's Burden To "Bear Responsibility For Any Lack Of Clarity" Under *United States v. Anderson*, 970 F.2d 602 (9th Cir. 1992).

Given the U.S. Government's acknowledgment of the *Anderson* decision, the underlying District Court's finding of ambiguity places the burden of responsibility squarely with the U.S. Government. Although the Ninth Circuit opinion addresses the *Anderson* case, it does not address the predominant issue concerning lack of clarity as Petitioner urged in his appellant papers.

Furthermore, "And if any ambiguities are present [in the plea agreement], they will be resolved against the drafter, in this case the Government." *United States v. Massey*, 997 F.2d 823, 824 (10th Cir. 1993).

D. The Ninth Circuit Decision Did Not Contemplate The "Same Course Of Conduct" Issue Under The Sentencing Guidelines, Namely That No Requirement Exists That

Petitioner Be "Connected Together" By Common Participants Or By An Overall Scheme, But Rather, Whether Or Not Petitioner Has Engaged In An Identifiable Behavior Pattern Under *United States v. Perdomo*, 927 F.2d 111 (2d Cir. 1991).

Since there exists no dispute that Petitioner has been indicted in Indiana for the exact same offense as he was indicted and served time for in California (18 U.S.C. §371), the Ninth Circuit's oversight of this fact was critical in affirming the underlying District Court decision. There is no dispute that the same course of conduct was alleged in both the Indiana and California indictments.

E. The Ninth Circuit Failed To Address The Wide Disparity In Sentencing Imposed For Petitioner v. Co-Defendants, Contrary To The "Reasonable Uniformity" Requirement Under *United States v. Hahn*, 968 F.2d 933 (9th Cir. 1992).

Under *Hahn*, the "relevant conduct" doctrine is promulgated by the sentencing guidelines in that they seek "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Hahn*, at 908. To stray from such uniformity, the "relevant conduct" provision would undermine "perhaps the most important objective of the [sentencing] guidelines." *Hahn*, at 909.

Petitioner submits that significant lack of uniformity existed to deny his Constitutional rights.

F. The Ninth Circuit Failed To Address Petitioner's Reasonable Understanding Of The Plea Agreement As Required Under *United States v. De La Fuente*, 8 F.3d 1333 (9th Cir. 1993).

Under *De La Fuente*, "the most important facet of plea agreement interpretation is the *defendant's* reasonable understanding of the plea agreement term since it is that understanding which *induced* the defendant to plead guilty." (emphasis added) *De La Fuente* at 1337-1338. Given that Petitioner's plea agreement contained tax loss language of "$200,000-350,000" versus a $70,000 tax loss for his co-defendants, coupled with the fact that Petitioner was aware of a simultaneous Indiana investigation and Grand Jury empanelment, it is inconceivable that Petitioner had any other "reasonable understanding" than that his plea agreement put behind him all "similarly related offenses" arising out of the California Indictment.

CONCLUSION

The Government's failure to properly draft the required language providing a reasonable understanding that he should not expect protection from further prosecution under the indictment charges is the fault of the

Government and should not be burdened upon Petitioner. The Government has acknowledged that the *Anderson* case is controlling when it requires the Government to "bear responsibility for any lack of clarity" in preparing plea agreements. The Government therefore concedes its burden and responsibility in the instant case. The Ninth Circuit erred in not applying the applicable and controlling case law to the facts here. Given the facts at hand, there is no logical or plausible opportunity for the Government to sufficiently demonstrate that Petitioner had a "reasonable understanding" that by pleading guilty and being incarcerated, he still needed to fear the Indiana investigation and Indictment.

Therefore, Petitioner Mark G. Sertich respectfully requests the Court to grant his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee	) NO. 94-50597
-vs-	) D.C.NO.91-903WJR
MARK G. SERTICH, aka MARK SERTICH	)
	) MEMORANDUM*
Defendant-Appellant,	)

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted September 12, 1995
Pasadena, California

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: BROWNING and PREGERSON, Circuit Judges and TANNER,** District Court Judge

Mark Sertich appeals from the denial of his motion to enforce the nonprosecution paragraph of his plea agreement entered into the Central District of California to bar a subsequent prosecution in the Northern District of Indiana. We have jurisdiction over this timely appeal and AFFIRM.

I. FACTS

The parties are aware of the facts and procedural background leading up to this appeal so we will not repeat them here.

II. STANDARD OF REVIEW

This court reviews *de novo* whether or not a provision of a plea agreement is ambiguous. United States v. Anderson, 970 F.2d 602, 606 (1992), amended, 990 F.2d 1163 (9th Cir. 1993). "Plea agreements are contractual in nature and are measured by contract law standards." United States v. Keller, 902 F.2d 1391, 1393 (9th Cir.

**The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

1990). "In construing an agreement , the court must determine what the defendant reasonable understood to be the terms of the agreement when he pleaded guilty." United States v. De La Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993) (footnotes omitted). Because the understanding of the parties is a factual question, the district court determines this question and this court reviews that determination only for clear error. Anderson, 970 F.2d at 607; United States v. Read, 778 F.2d 1437, 1441 (9th Cir. 1985), cert.denied, 479 U.S. 835 (1986).

DISCUSSION

Paragraph VI of the plea agreement entitled "Nonprosecution for Other Related Offenses" provides:

This office agrees not to criminally prosecute you for other related offenses connected with the activities charged in the indictment, specifically, with respect to activities involving Richard Allen from approximately August 24, 1990 through October 11, 1991 within the jurisdiction of the Central District of California.

Additionally, "[t]his office" is defined in paragraph I of the agreement as the "United States Attorney's Office for the Central District of California."

The California indictment charges that: "Beginning on a date unknown to the Grand Jury and continuing to on or about October 11, 1991 within the Central District of California and elsewhere...," the named defendants and others conspired to evade excise taxes on diesel fuel. The Indiana indictment charged: "From on or about October, '986, through on or about November 17, 1987 in the Northern District of Indiana, and elsewhere..." along with others, conspired to evade excise taxes on diesel fuel.

Sertich's agreement that the nonprosecution paragraph bound not only the United States Attorney's Office in the Central District of California, but bound the government as a whole based on two Fourth Circuit cases, United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972)(holding that if the district court were to find that the United States government promised to prosecute the defendant only in the District of Columbia, then the government was barred from prosecuting in the Eastern District of Virginia) and United States v. Harvey, 791 F.2d 294, 303 (4th Cir.1986) (holding that a plea agreement that is ambiguous as to whether it binds only the prosecuting district must be resolved against the government to bind the United States

in all districts).[1] Carter and Harvey are not controlling. In this case, Sertich and the government had a written plea agreement. Sertich's argument that he was promised by the Assistant United States Attorney of the Central District of California that he would not be prosecuted in Indiana is not supported by the record. The district court's implicit finding on this point is not clearly erroneous. Thus Carter is not on point.

In Harvey the Fourth Circuit found that the plea agreement was ambiguous as a matter of law. Harvey, 791 F.2d at 301. The plea agreement in that case was ambiguous in that it used the terms "Government" and

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[1]There is a tension in the writings of the Fourth and Second Circuit.

In United States v. Annabi, 771 F.2d 670, 672 (2d Cir 1985)(per curiam), the Second Circuit held: "A plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction." See also United States v. Russo, 801 F.2d 624 (2d Cir. 1986); United States v. Alessi, 544 F.2d 1139 (2d Cir. 1976), cert.denied, 429 U.S. 960, 97 S.Ct. 384, 50 L.Ed. 2d 327 (1976).

United States v. Ingram 1179 F.2d 1185, n.7 (7th Cir. 1992).

"Eastern District of Virginia" interchangeably. Id. at 302. The plea agreement at issue here alleviates the ambiguity in the language that concerned the Harvey court. In Sertich's agreement the agency -- "this office" -- was clearly defined as the United States Attorney's Office for the Central District of California. Consistently throughout the agreement the term "this Office" is used. The only instance the term "the government" appears in Sertich's plea agreement is in the final paragraph regarding no other agreements. This single usage does not create an ambiguity. See United States v. Ingram, 979 F.2d 1179, 1185 n.7 (7th Cir. 1992).

Furthermore, the Harvey court was concerned that Harvey's plea agreement did not refer to the geographical area covered by the agreement. See Harvey, 791 f.2d at 296 n.1. Sertich's agreement, by contrast, clearly refers to the geographical restriction covered by the plea agreement. The last clause of the paragraph at issue states "within the jurisdiction of the Central District of California."

We, therefore, hold that Sertich's plea agreement is clear as a matter of law. It bound only the United States Attorney's office for the Central District of California. The

district court's order denying the motion to enforce the plea agreement was not clearly erroneous.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-50597
CT/AG#: CR-91-00903-WR(CE)-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee

MARK G. SERTICH, aka: MARK SERTICH,

Defendant - Appellant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered October 24, 1995.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee	)	NO. 94-50597
-vs-	)	
MARK G. SERTICH, aka MARK SERTICH	)	
	)	ORDER*
Defendant-Appellant,	)	

Before: BROWNING and PREGERSON, Circuit Judges and TANNER,** District Court Judge

Appellant's petition to recall the mandate is DENIED.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.